In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 428

CADILLAC PUBLISHING COMPANY, INC., PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. App. pp. 25-27) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1955. The petition for a writ of certiorari was filed on September 27, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the courts below correctly declined to review the intermediate

action of the Deputy Postmaster General in denying petitioner's motion to dismiss an intra-agency appeal.

STATEMENT

On May 21, 1954, petitioner filed a complaint in the District Court (R. 2-8) alleging that the Acting Solicitor of the Post Office Department had on February 24, 1953, filed a complaint with the Office of Hearing Examiners of the Post Office Department charging the Cadillac Publishing Co. with conducting an unlawful enterprise through the use of the United States mails in violation of the obscenity provisions of 39 U. S. C. 259a (R. 3-4); that after a hearing before the Hearing Examiner the Solicitor's complaint was dismissed for failing to set forth facts sufficient to constitute a violation of the invoked statute (R. 4); that following the dismissal of the complaint, the Solicitor for the Post Office Department, on November 27, 1953, filed with the Office of Hearing Examiners a notice of intention to appeal to the Postmaster General from the Hearing Examiner's decision and, under date of November 27, 1953, a brief on appeal was filed (R. 4); that petitioner thereupon moved to dismiss the Solicitor's appeal and to strike the notice of intention to appeal and the appellate brief on the ground that the Post Office Department's Rules of Practice in Proceedings under the Administrative Procedure Act did not provide for an appeal by the Solicitor from an adverse decision by the Office of Hearing Examiners (R. 4-5); and that on February 15, 1954, the Deputy Postmaster General denied the motion to dismiss the Solicitor's appeal and fixed a time for petitioner to reply to the appeal (R. 4-5).

The complaint filed in the District Court prayed for a declaratory judgment to the effect that neither the

Postmaster General nor any subordinate official is authorized by law to reexamine the matters and facts decided by the Office of Hearing Examiners; and that the action of the Postmaster General in delegating his quasi-judicial authority to a subordinate and the action of the Solicitor in attempting to obtain a reversal of the Hearing Examiner's decision "is and are, null, and void and of no effect" (R. 8). It further prayed that the Postmaster General and his subordinates be restrained, *pendente lite* and permanently, from proceeding further in the matter involving petitioner (R. 8).

The complaint was dismissed by the District Court. On appeal, the Court of Appeals noted that, as matters stood in the Post Office Department, the complaint against petitioner had been dismissed by the Hearing Examiner, that no order with respect to petitioner's mail had been issued, and that none could issue until the administrative process was completed. It then held that petitioner "should have exhausted the administrative remedies open to it before seeking judicial intervention" (Pet. 27), and affirmed.

ARGUMENT

While the petition advances a number of broad questions for this Court's consideration (Pet. 2-3), the record, in the words of the court below, "shows no more than that appellant complains of a District Court order which refused judicial review of an intermediate agency order which had denied appellant's motion to dismiss an intra-agency appeal" (Pet. 27). And the decision of the Court of Appeals rests entirely on the narrow ground that petitioner "should have exhausted the administrative remedies open to it before seeking judicial intervention" (Pet. 27). Consequently, the

case presents no question which warrants further review by this Court.

1. The gravamen of petitioner's complaint in the District Court is directed against the denial by the Deputy Postmaster General of petitioner's motion to dismiss the Solicitor's appeal from an order of the Hearing Examiner which dismissed the agency's complaint filed against petitioner. Thus, petitioner has sought judicial intervention at a time when the agency's complaint against it stands dismissed and at a time when the only adverse agency determination is a denial of the motion to dismiss the intra-agency appeal by the Solicitor. Clearly, where petitioner's only ground of complaint relates to a procedural ruling at an intermediate stage of the administrative process, it cannot be said, for purposes of judicial intervention, that there has been an exhaustion or even a pursuit of available administrative remedies which would justify, as petitioner urges, judicial interference or superintendence. The decisions of the courts below refusing to interfere with the intermediate administrative processes are therefore correct and are in harmony with the repeated holdings of this Court. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Federal Power Comm'n* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383-384; *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540, 543; *Federal Power Comm'n* v. *Arkansas Power & Light Co.*, 330 U.S. 802; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Securities & Exchange Comm'n* v. *Otis & Co.*, 338 U.S. 843; *Gusik* v. *Schilder*, 340 U.S. 128; *Public Service Comm'n of Utah* v. *Wycoff Company, Inc.*, 344 U.S. 237; *Franklin* v. *Jonco Aircraft Corp.*, 346 U.S. 868, summarily reversing 114 F. Supp.

392 (N.D. Tex.); *Public Utilities Comm'n of California* v. *United Air Lines,* 346 U.S. 402.[1]

2. In addition to the question upon which the court below decided the case, the petition suggests further questions (Pet. 2) dealing with such matters as (1) the jurisdiction of the federal courts, (2) the interpretation and construction of the Administrative Procedure Act, and (3) the delegability of the "quasi-judicial" powers of the Postmaster General to his subordinates. These are questions, however, which, if they presently exist at all, may wholly disappear or become moot once the administrative process is permitted to run its course. In this respect, therefore, petitioner's suit is likewise premature (*Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 772-773), since these questions are inappropriate for judicial consideration at this time.[2]

---

[1] Because of the preliminary and procedural character of the agency action underlying petitioner's complaint, the result below is compelled by the terms of the Administrative Procedure Act, 5 U.S.C. 1009(c), which provides in pertinent part that "* * * Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *"

[2] Petitioner's assertions with respect to the inadequacy and illegality of the administrative processes and the present and prospective hardship resulting from the denial of judicial intervention at this time are plainly without merit. It is well settled that the rule requiring the exhaustion of administrative processes cannot be circumvented by considerations of expense, annoyance, and inconvenience, which are common attributes not only of administrative proceedings, but of any lawsuit. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 51-52; *Yakus* v. *United States,* 321 U.S. 414, 434; *United States* v. *Morgan,* 313 U.S. 409; *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752; *Franklin* v. *Jonco Aircraft Corp.* 346 U.S. 868, summarily reversing 114 F. Supp. 392. (N.D. Tex.)

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
PAUL A. SWEENEY,
JOHN G. LAUGHLIN,
Attorneys.

OCTOBER, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 903906 481